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No. 84-170

In the Supreme Court of the United States

OCTOBER TERM, 1984

IMPRO PRODUCTS, INC., PETITIONER

v.

JOHN R. BLOCK, SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner contends that the court of appeals erred in holding that one of its claims is barred by the six-year statute of limitations contained in 28 U.S.C. 2401(a).

1. a. In 1965, petitioner applied to the Department of Agriculture, pursuant to the Virus, Serum and Toxin Act of 1913, 21 U.S.C. 151 *et seq.*, for a license to produce and sell a veterinary product known as Whey Antibody Blend. The Department granted petitioner a temporary license that expired in September 1967, but has since denied petitioner's further license applications. Petitioner has never sought judicial review of these denials. Pet. App. A2-A3.

During 1966 and 1967, Department scientists conducted a test of Whey Antibody Blend and concluded that, contrary to petitioner's claims, the product is not effective in improving bovine health and milk production. The scientists published the results of their study in the August 1970 issue of the *American Journal of Veterinary Research.*

Since that time, the Department has released copies of the article pursuant to 7 U.S.C. 430, which provides that the Secretary of Agriculture may test veterinary products and "disseminate the results of said tests in such manner as he may deem best." Petitioner has repeatedly sought reconsideration of the test results, most recently in a letter to the Department on March 2, 1981. The Department has consistently taken the position that the test results are sound. Pet. App. A3-A4. In response to the March 1981 letter, it invited petitioner to submit a new license application with supporting data, but petitioner has declined to do so.

b. In June 1981, petitioner filed this suit in the United States District Court for the District of Columbia, seeking a declaratory judgment that the Department's test of Whey Antibody Blend was unreliable and an injunction against the Department's reliance on and distribution of the 1970 article. Petitioner alleged violations of the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, and the Due Process Clause of the Fifth Amendment. The Secretary responded, inter alia, that distribution of the article did not constitute reviewable "agency action" under the APA (5 U.S.C. 551(13), 704) and that the suit was barred by the statute of limitations. Pet. App. A4-A5. The district court rejected these contentions and enjoined dissemination of the article, based on its view that the article contained misleading statements and that the decision to release it was an abuse of discretion (*id.* at A17-A26).

c. The court of appeals reversed on the ground that petitioner's challenge to the decision to disseminate the article was barred by the six-year statute of limitations contained in 28 U.S.C. 2401(a)[1] (Pet. App. A1-A15). The

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[1]28 U.S.C. 2401(a) provides in pertinent part:

> Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.

court of appeals reasoned that the Department's decision to release the test results and reprints of the article occurred at least ten years prior to the filing of the lawsuit, and that neither the subsequent releases of the article nor the Department's May 1981 response to petitioner's March 1981 letter restarted the six-year clock for purposes of Section 2401 (Pet. App. A10-A12 & n.9). The court also noted (*id.* at A10 n.8) that it had "no doubt" that Section 2401(a) was applicable to actions such as this seeking review of administrative decisions. The court remanded for consideration of petitioner's due process claim, which it found unclear from the pleadings and which had not yet been addressed by the district court (Pet. App. A12).[2]

2. The decision of the court of appeals holding that petitioner's claim is time-barred is manifestly correct and does not conflict with any decision of this Court or any other court of appeals. Further review is unwarranted.[3]

Petitioner argues solely that Section 2401(a) is not applicable because its claim is equitable, not legal (Pet. 6-12). But Section 2401(a) applies broadly to "every civil action," not only to suits at law. The courts have consistently construed this statute in accordance with its plain meaning, and have applied it to actions against the United States, including those for declaratory and injunctive relief pursuant to the APA, regardless of their legal or equitable nature. See, *e.g.*,

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[2]The court of appeals also noted the Secretary's substantial arguments with respect to the lack of any reviewable agency action, but declined to decide the issue (Pet. App. A6-A9).

[3]Review at this time is also unwarranted because of the interlocutory nature of the decision below, which remanded the case to the district court for further proceedings. Should petitioner prevail on its due process claim, its present argument may well be moot. Should petitioner be unsuccessful, it will be free to raise again the claim it now makes, together with any additional issues, following a final judgment in the district court.

Walters v. *Secretary of Defense*, 725 F.2d 107, 111-112 (D.C. Cir. 1983); *Boruski* v. *United States Government*, 493 F.2d 301, 304 n.5 (2d Cir.) (per curiam), cert. denied, 419 U.S. 808 (1974); *Screven* v. *United States*, 207 F.2d 740 (5th Cir. 1963); *Werner* v. *United States*, 188 F.2d 266, 268 (9th Cir. 1951); *Heritage Pullman Bank & Trust Co.* v. *United States*, 480 F. Supp. 54, 57 (N.D. Ill. 1979).[4]

This result is fully in accord with the Court's decisions in *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946), and *Russell* v. *Todd*, 309 U.S. 280 (1940). Contrary to petitioner's claim (Pet. 6-7), these cases do not stand for the proposition that a statute of limitations may never be applied to an equitable action. Rather, they explicitly recognize that Congress may enact statutes of limitations applicable to suits enforcing equitable rights, without regard to whether those rights may be concurrently enforced at law. See *Holmberg*, 327 U.S. at 395 ("If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitations is definitive."); *Russell*, 309 U.S. at 287, 289, 293.[5] Petitioner cites no case holding that Section 2401(a)'s

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[4]Regardless of whether the concurrency doctrine (see *Russell* v. *Todd*, 309 U.S. 280, 289 (1940)) would have been applicable to any of the cited cases (see Pet. 11-12), it is clear that the courts did not rely on that doctrine, but instead simply applied Section 2401(a) to the equitable claims asserted. See, *e.g.*, *Walters* v. *Secretary of Defense*, 725 F.2d at 112 ("section 2401(a) bars all untimely claims, whether equitable or legal[;] * * * [it] applie[s] to equitable relief sought from agency officials under the Administrative Procedure Act").

[5]*Holmberg* and *Russell* were suits to enforce federally created rights against private persons, not against the government. There was therefore no question raised with respect to whether the predecessors to Section 2401(a) were applicable. The question in each case was whether, in the absence of a federal statute of limitations applicable to the federal right being asserted, the statute of limitations of the forum state should be applied. Cf. *Guaranty Trust Co.* v. *York*, 326 U.S. 99 (1945).

reference to "every civil action" does not encompass equitable as well as legal claims.[6]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[6]Petitioner's reliance (Pet. 8-11) on *Saffron* v. *Department of the Navy*, 561 F.2d 938 (D.C. Cir. 1977), cert. denied, 434 U.S. 1033 (1978), and *Nemkov* v. *O'Hare Chicago Corp.*, 592 F.2d 351 (7th Cir. 1979), is misplaced. In *Saffron*, the court relied on the concurrency doctrine and so declined to decide whether Section 2401(a) applies to suits solely to enforce equitable rights (561 F.2d at 946 n.60). *Nemkov*, like *Holmberg* v. *Armbrecht, supra*, and *Russell* v. *Todd, supra*, was not a suit against the United States, and thus there was no question raised with respect to the applicability of Section 2401(a).

Petitioner's argument (Pet. 9-10) that the 1948 revision of the predecessors to Section 2401(a), which changed the word "suit" to "civil action," was not meant to broaden the scope of the statute to encompass all actions, whether at law or equity, has been rejected by the courts. See, *e.g.*, *Werner* v. *United States, supra*; see also *Saffron* v. *Department of the Navy*, 561 F.2d at 946 (McGowan, J., concurring separately) ("The shift to the phrase 'civil action' was obviously intended to reflect the merger of law and equity * * *. [T]here can be no mistaking [Congress's] purpose to lay to rest the ancient distinctions"). *United States* v. *Glenn*, 231 F.2d 884 (9th Cir.), cert. denied, 352 U.S. 926 (1956), is inapposite because it addressed only the applicability of a tolling provision in Section 2401(a) to the provisions of Section 2401(b) governing tort claims. *Richardson* v. *Morris*, 409 U.S. 464 (1973) (per curiam), did not address Section 2401 at all. Rather, it merely interpreted a provision of the Tucker Act so as to maintain the concurrent jurisdiction of the district courts and what was then the Court of Claims.